Filed 3/28/14 P. v. Lexington Nat. Ins. Corp. CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LEXINGTON NATIONAL INSURANCE CORPORATION et al., Defendants and Appellants.	A137834 (Sonoma County Super. Ct. No. MCR415271)

Lexington National Insurance Corporation (Lexington National) is a professional surety company that appeals from an order forfeiting bail and from the summary judgment based on the forfeiture. Lexington National contends the order of forfeiture is void because there was no court order directing the criminal defendant to appear at the hearing at which bail was forfeited. It also argues that the notice of forfeiture was constitutionally insufficient and violated its due process rights. We reject these contentions and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2011, Lexington National, through its bail agent, posted a $100,000 bail bond for the release of Sergio Ortega Mendiola, who was charged with multiple felony counts of robbery, false imprisonment, and assault with a deadly weapon. The court ordered bail forfeited after Mendiola failed to appear in court on August 19, 2011. On August 23, 2011, the court clerk mailed a notice of forfeiture to Lexington National and its bail agent that read in full: "Please be advised that Bail Bond #2011EE001716 in the

amount of $100,000 which was posted by you on behalf of the above defendant has been ordered forfeited by the Court for failure to appear on August 19, 2011."

On August 31, 2012, Lexington National filed a motion to vacate forfeiture and exonerate bail on the ground the notice of forfeiture was constitutionally inadequate. The court denied the motion on January 11, 2013, and entered summary judgment on the forfeiture on January 15, 2013. Lexington National filed a timely appeal from the summary judgment and the order denying the motion to vacate forfeiture and exonerate bail.

DISCUSSION

1. *Because the court directed Mendiola to be present at the hearing on August 19, 2011, the forfeiture of bail is not void.*

Lexington National contends the August 19, 2011, order forfeiting bail is void because the court lacked jurisdiction to declare a bail forfeiture in the absence of a court order requiring defendant Mendiola's presence at that hearing.[1] As we explain, while we agree that the trial court could have issued a more concise and direct order requiring Mendiola's presence at the hearing, the plain import of the extended colloquy between the court and counsel at an earlier hearing was that Mendiola was required to be present in court on August 19.

Penal Code section 1305 sets forth the jurisdictional prerequisites that must be satisfied before a court orders a forfeiture of bail.[2] "These requirements are (1) the defendant must fail to appear for arraignment, trial, judgment, execution of judgment, or when his presence is otherwise lawfully required; and (2) the failure to appear must be

---

[1]Lexington National did not raise this issue in its motion to vacate forfeiture and exonerate bail, which was premised solely on a contention that the notice of forfeiture was insufficient. It argues that the issue may be raised on appeal because an error that goes to the court's jurisdiction to enforce a bail forfeiture may be raised at any time, including on appeal. The People concede that the issue may be raised for the first time on appeal. We will assume, without deciding, that the issue is properly before us.

[2]All further statutory references are to the Penal Code unless otherwise specified.

without sufficient excuse."[3] (*People v. Classified Ins. Corp.* (1985) 164 Cal.App.3d 341, 344 (*Classified*).) In *Classified*, the court concluded that "[a]bsent an order or *other actual notification from the court* that [a defendant's] appearance was required at a given date and time, the failure of [the defendant] to appear cannot be grounds for forfeiture of bail under section 1305." (*Id.* at p. 346, italics added.)

Here, Lexington National claims the court made no specific order commanding the defendant's presence at a certain date and time. As support for this claim, Lexington National quotes the concluding passages from a hearing that took place on July 22, 2011.[4] It suggests that, at most, defense counsel offered to have his client appear on August 19 but that the court did not require a personal appearance. A review of the entire transcript of the July 22 hearing belies Lexington National's characterization.

Mendiola was not present at the July 22 hearing. Instead, at the beginning of the hearing, the court confirmed that defense counsel was appearing on behalf of Mendiola pursuant to section 977, which allows a felony defendant to appear through an attorney if the defendant waives a personal appearance. At the time of the July 22 hearing, a pretrial hearing was set for August 4 and trial was set for August 12. Defense counsel asked the court to vacate these dates so that he could file a speedy trial motion. The court responded that Mendiola would have to be present to waive time to a later trial date:

---

[3]Section 1305, subdivision (a) provides: "A court shall in open court declare forfeited the undertaking of bail or the money or property deposited as bail if, without sufficient excuse, a defendant fails to appear for any of the following: [¶] (1) Arraignment. [¶] (2) Trial. [¶] (3) Judgment. [¶] (4) Any other occasion prior to the pronouncement of judgment if the defendant's presence in court is lawfully required. [¶] (5) To surrender himself or herself in execution of the judgment after appeal. [¶] However, the court shall not have jurisdiction to declare a forfeiture and the bail shall be released of all obligations under the bond if the case is dismissed or if no complaint is filed within 15 days from the date of arraignment."

[4]All further references to dates without specification of the year are to dates in 2011.

"THE COURT: The problem is that your client *would have to be present* to waive time to the next date, plus 60 days, otherwise you're going to jam up the courts." (Italics added.)

"[DEFENSE COUNSEL]: Right, but I don't think we have to set the trial date at this point."

"THE COURT: So would you like the speedy trial motion heard first? *He's going to need to be present.*" (Italics added.)

"[PROSECUTOR]: So if the Court sets it, the only issue is whether that would be set because, presumably, he could waive time at that date, but if it's too close to the end of the 60 days, then we're going to have a problem."

"THE COURT: Exactly. *That's why he needs to be present to request another waiver.*" (Italics added.)

Defense counsel then suggested that Mendiola could appear during the last week of September for a further time waiver. The court responded that it could not vacate the trial date "unless he's present," and then asked defense counsel, "When can you have him here?" Defense counsel responded, "why would it be a problem for him to come in on the filing date on the 19th of August?" The prosecutor asked whether Mendiola would "be present on that date?" Defense counsel responded, "Yes."

The court and counsel then discussed rescheduling the trial date and the pretrial conference, with the court informing defense counsel, "[b]ecause your client is not here, I can't set these dates. I'll keep this matter on for trial." The court also told defense counsel, "I want to make sure your client is okay with everything that's going on." The court then asked defense counsel when he could have his client present in court. Defense counsel responded that Mendiola would be present on August 12. The court then waived Mendiola's *appearance* on August 4 and 10 and vacated those hearing dates, with the trial date still set on August 12. After the prosecutor suggested the trial date could be vacated, the court agreed but stated that it would reset the new trial date when the matter was heard on August 12. It was at this point that defense counsel suggested allowing Mendiola to appear on August 19 instead of August 12:

"[DEFENSE COUNSEL]: Okay. If we are going to vacate the trial on August 12th, can we just have Mr. Mendiola come on August 19th when I file the Cerna [sic] motion, to save him a sooner appearance? It all boils down to money for him. He's made several trips up here, and it's very costly."

The court agreed to vacate the hearing on August 12 and set a hearing for August 19 at 8:30 "[t]o file your Cerna [sic] motion and to reset the jury trial dates."

Although the court did not conclude the hearing by directing Mendiola to be present at the August 19 hearing, the plain import of the colloquy between the court and counsel was that the court required Mendiola to be present at that time. The court repeatedly emphasized the importance of having Mendiola present to waive time. Defense counsel clearly understood that the court expected Mendiola to be present, and at one point even represented that his client would appear on August 12, before that hearing date was vacated and continued to August 19 at defense counsel's request. Indeed, defense counsel offered to have Mendiola present on August 19 to avoid an earlier personal appearance that would be costly to his client.

Under the circumstances presented here, there was sufficient actual notification from the court that Mendiola's appearance was required on August 19. (See *Classified, supra,* 164 Cal.App.3d at p. 346 [order or "actual notification" of required appearance suffices to support bail forfeiture]). Any other reading of the transcript of the July 22 hearing would be contrary to the plain intent and understanding of the court and counsel. Lexington National selectively quotes the last portion of the hearing to suggest that defense counsel simply offered to have Mendiola personally appear on August 19, but a review of the entire transcript reveals that defense counsel's offer was in response to the court's clear directive to have Mendiola present at the next scheduled hearing so that he could personally waive time.

Lexington National's reliance on *Classified* is unavailing. Lexington National argues the case stands for the proposition that bail forfeiture is unauthorized unless there is a specific order requiring the defendant's personal appearance at a hearing. We disagree. In *People v. Sacramento Bail Bonds* (1989) 210 Cal.App.3d 118, 122, the

Court of Appeal declined to follow the dictum in *Classified* suggesting that bail cannot be forfeited unless a defendant's appearance is required by a specific court order. The court stated, "To our knowledge no other case has construed section 1305 to require categorically such an order of court." (*Id.* at p. 122.) In *People v. American Bankers Ins. Co.* (1990) 225 Cal.App.3d 1378, 1382, the court that decided *Classified* agreed with the distinction drawn by the court in *Sacramento Bail Bonds.* The court also clarified that "*Classified* primarily was concerned with the unfairness of allowing bail to be forfeited when the defendant had no notice of the date on which the hearing was to be held." (*Ibid.*) In *Classified*, the defendant had lost contact with his counsel, and there was no indication he was informed of the hearing at which his bail was forfeited. (*Classified, supra,* 164 Cal.App.3d at p. 346, fn. 3.) When the defendant failed to appear at a hearing on a motion to set aside the information pursuant to section 955, the court forfeited his bail even though there was no order or other notification requiring him to be present at the hearing. (*Id.* at pp. 343, 346.) The appellate court rejected the People's contention that a defendant is required to be present at all hearings unless the defendant files a section 977 waiver. (*Id.* at pp. 345–346.)

Here, unlike in *Classified,* the People do not claim that Mendiola's personal appearance was required on August 19 because he had failed to file a section 977 waiver for that date. Rather, there was actual notification to Mendiola's counsel that Mendiola was required to be present at the next scheduled hearing, which was set for August 19. The trial court was justified in relying upon " 'the good faith and good judgment of defense counsel' [citation] to inform defendant that his presence was required." (*People v. Sacramento Bail Bonds, supra,* 210 Cal.App.3d at p. 121.) While the court could have avoided the dispute over this issue by concisely stating at the end of the July 22 hearing that Mendiola was required to personally appear on August 19, we do not think the court's intent is subject to dispute in light of the entirety of the July 22 hearing. Accordingly, we reject Lexington National's contention that the trial court lacked jurisdiction to declare bail forfeited on August 19.

2. *The notice of forfeiture is sufficient to satisfy due process concerns.*

Lexington National next argues that the court lacked jurisdiction to enter summary judgment because the notice of forfeiture was constitutionally inadequate to satisfy due process standards. It claims the notice was insufficient because it failed to recite the statutory provisions under which relief from forfeiture could be obtained, including any relevant time limitations. As support for this proposition, Lexington National relies on principles established by the United States Supreme Court (see *Memphis Light, Gas & Water Div. v. Craft* (1978) 436 U.S. 1) and two California Court of Appeal decisions (*People v. Swink* (1984) 150 Cal.App.3d 1076 (*Swink*); *Minor v. Municipal Court* (1990) 219 Cal.App.3d 1541 (*Minor*)). In *Swink* and *Minor*, the Courts of Appeal held that a notice of bail forfeiture sent to a *lay* individual is insufficient if it fails to inform the recipient of the underlying statutory scheme governing bail forfeiture or the existence of jurisdictional time limits to exonerate bail. (*Swink, supra,* at p. 1082; *Minor, supra,* at pp. 1550–1551.)

In *People v. Accredited Surety & Casualty Co., Inc.* (2013) 220 Cal.App.4th 1137, 1142 (*Accredited Surety*), this court considered whether the analysis in *Swink* and *Minor* "applies when bond is posted by a corporate surety that presumably knows, or at least should know, of the statutory provisions that govern the issuance of bail bonds, forfeiture of bail, and relief from forfeiture." We held that the requirements outlined in *Swink* and *Minor* are inapplicable to a corporate surety, reasoning that "the class of those for whom due process requires that notice of a bail forfeiture contain explicit notification of the procedure by which to obtain relief from the forfeiture does not include professional sureties, such as the surety in the present case." (*Id.* at p. 1145.)

This case is indistinguishable from *Accredited Surety.* Lexington National is a professional surety. The notice of forfeiture satisfied the literal terms of the governing statute. (See § 1305, subd. (b); *Accredited Surety*, *supra*, 220 Cal.App.4th at p. 1141.) Under *Accredited Surety,* the notice was sufficient and did not violate Lexington National's due process rights.

Lexington National asks this court to revisit *Accredited Surety* and retract the holding in that case. It claims that we focused exclusively on the surety and failed to consider the important role that bail agents play. According to Lexington National, statutory notice is required to be given to both the surety *and* the bail agent. (§ 1305, subd. (b).) It argues that bail agents are natural persons who, like the personal sureties in *Swink* and *Minor*, will have varying degrees of education, experience, and resources. Further, it claims that bail agents are primarily responsible for locating and returning a defendant to court, unlike sureties who simply put up the bond. Consequently, American Contractors contends that the notice of forfeiture must contain the information required by *Swink* and *Minor*, regardless of whether one of the recipients of the notice is a professional surety.

We decline to revisit our decision in *Accredited Surety*. As an initial matter, we question the assertion that bail agents may be unaware of the procedures to vacate a bail forfeiture. In California, bail agents must be licensed by the state and must meet certain minimum requirements. (Ins. Code, § 1800 et seq.) Unlike a lay person, a licensed bail agent is presumably aware of the statutory procedures for obtaining relief from forfeiture, just like a professional surety.

In any event, the emphasis in *Swink* and *Minor* was upon providing proper notice to "[s]ureties and depositors" who risk losing the bond they have posted. (*Swink*, *supra*, 150 Cal.App.3d at p. 1082; see also *Minor*, *supra*, 219 Cal.App.3d at p. 1550.) The concern was over the "risk of erroneous deprivation of the *bail depositor's interest* in recouping the deposit . . . ." (*Accredited Surety*, *supra*, 220 Cal.App.4th at p. 1144, italics added.) The surety or depositor is the party that has an interest in avoiding forfeiture and receiving sufficient due process. By contrast, a bail agent who simply acts on behalf of a surety does not face the same risk of an erroneous deprivation of a property interest. Accordingly, a notice of forfeiture that is considered sufficient under *Accredited Surety* because it is served on a professional surety is not rendered constitutionally inadequate simply because it is also served on a bail agent.

DISPOSITION

The summary judgment entered on January 15, 2013, and the order of January 11, 2013, denying the motion to vacate forfeiture and exonerate bail are affirmed. Respondent shall recover its costs on appeal.

_____
McGuiness, P.J.

We concur:

_____
Jenkins, J.

_____
Pollak, J.